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DATIN SERI ROSMAH MANSOR v. PP

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
NORDIN HASSAN JCA
HASHIM HAMZAH JCA
B [CRIMINAL APPEAL: W-07-79-09-2021]
29 NOVEMBER 2020

Abstract *– An application to stay a criminal proceeding pending an appeal against a preliminary ruling made therein by the trial judge must show exceptional unusual or compelling circumstances for stay to be granted. The determinative principles that the judge is bound to consider include: (i) a strong public interest in the prosecution of the crime; (ii) the desirability or otherwise of the criminal process to be interrupted and whether such interference is antithetical to the proper and just disposition of the case; and (iii) whether the accused's right over such ruling are best vindicated by way of an appeal after conviction, if any.*

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CIVIL PROCEDURE: *Stay of proceedings – Application for – Criminal proceedings at High Court be stayed pending disposal of appeal at Court of Appeal – Whether existence of exceptional and unusual circumstances shown – Whether the fact that a proceeding would be rendered a nullity considered exceptional or unusual circumstances – Whether granting of stay in tandem with intention of Parliament in enacting s. 172B of Criminal Procedure Code*

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The applicant was charged with two counts of charges at the High Court, under the Malaysian Anti-Corruption Commission Act 2009, for corruption ('High Court proceedings'). The High Court proceedings was at the defence stage, with the continuation of its hearing scheduled to be on certain specified dates. Nevertheless, the applicant's current application at this court was for an order to stay the High Court proceedings pending the disposal of her appeal to the Court of Appeal against the ruling of the High Court Judge ('HCJ'), that dismissed her applications to have the High Court proceedings nullified, and the lead prosecutor, Datuk Gopal Sri Ram ('DGSR'), disqualified from continuing to conduct and lead the prosecution in the same proceedings ('appeal'). In support of her application, the applicant stated, mainly on, in the event her appeal was allowed by the Court of Appeal and the stay was not granted, it would render the appeal nugatory as the appeal and the High Court proceedings involved the same subject matter, *ie*, on the legality of the High Court proceedings and the appointment of DGSR as the lead prosecutor. Therefore, time and efforts of all parties would be wasted if the High Court proceedings were to continue. Hence, the issue was whether the applicant had successfully shown the existence of exceptional and unusual circumstances so as to allow the court to grant a stay towards the High Court proceedings.

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Held (dismissing application)
Per Nordin Hassan JCA delivering the judgment of the court:

(1) The fact that a proceeding may be rendered a nullity is not a special circumstance. Hence, it does not support the applicant's application for stay. (paras 9 & 11)

(2) Public interest dictates that trials of serious offences, especially by public figure, ought to be resolved expeditiously without interruption or fragmentation by interlocutory appeal. The hearing of the High Court proceedings had already commenced, hence, it needs to be completed without delay. It would be in the best interest of the applicant if the High Court proceedings be resolved as soon as possible as the applicant would have the opportunity to put her defence and be able to clear her name, if she is innocent. In addition, this would also be in tandem with the intention of the Parliament in enacting s. 172B(4) of the Criminal Procedure Code which requires a trial to commence no later than three months after an accused was charged. Therefore, a long delay, including a granting of stay of proceedings without exceptional or unusual circumstances, would defeat the Parliament's intention. As such, the applicant had not shown any exceptional or unusual circumstances to justify the stay application. The application for stay was dismissed. (paras 12, 13, 17 & 18)

Case(s) referred to:
Leong Poh Shee v. Ng Kat Chong [1965] 1 LNS 90 HC ***(refd)***
PP v. Dato' Sri Najib Hj Abdul Razak [2019] 6 CLJ 561 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51A, 172, 172B(4)

For the appellant - Jagjit Singh Vasawa Singh, Hj Akberdin Hj Abdul Kader, Hj Azrul Zulkifli Stork, Meor Hafiz Salehan, Ummi Kartini Bad Latiff, Ardy Suffian Hj Akberdin & Azalea Nazihah Zulkefli; M/s Akberdin & Co
For the respondent - Gopal Sri Ram SDPP, Ahmad Akram Gharib, Mohamad Mustaffa P Kunyalam, Deepa Nair Thevaharan, Poh Yih Tinn, Fariza Amira Azman, DPPs

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial Nos: WA-45-9-03-2019 & WA-45-19-07-2019.]

Reported by Syamim Ariffin

JUDGMENT

Nordin Hassan JCA:

[1] The applicant filed a notice of motion for an order that the criminal proceedings No. WA-45-9-03-2019 and WA-45-19-07-2019 be stayed pending the disposal of the applicant's appeals against the ruling of the learned High Court Judge in dismissing the applicant's applications to nullify

A the applicant's trial and to disqualify the lead prosecutor Datuk Gopal Sri Ram ("DGSR") from conducting and leading the prosecution. An oral application for stay of the proceedings was dismissed by the trial judge.

[2] The applicant was charged with two corruption offences under the Malaysian Anti-Corruption Commission Act 2009 in the High Court at
B Kuala Lumpur and the trial is at the defence stage which has been fixed for continuation of hearing on 5, 7, 21, 28 October 2021 and 15 November 2021.

[3] In the notice of motion, the appellant's grounds for stay of proceedings
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(i) if stay is not granted and if the applicant's appeal is allowed by the Court of Appeal, it would render the appeal nugatory. As such, it is a waste of time and efforts by all parties for the continuation of the trial;

(ii) the decision of the High Court Judge is appealable to the Court of
D Appeal without having to wait for the court's decision at the end of the defence case;

(iii) there is a novel question of law in the said appeal which concerns the legality of the proceedings against the appellant;

E (iv) the legality of the appointment of DGSR as Senior Deputy Public Prosecutor by *fiat* should be determined first by Court of Appeal and/ or Federal Court before the prosecution against the appellant;

(v) the appellant's rights for fair and impartial trial will be prejudiced if stay of proceedings is not granted;

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(vi) there are special circumstances for granting the stay of proceedings.

[4] On this issue of stay of proceedings in a criminal trial, first and foremost, it relates to an exercise of judicial discretion and to succeed in such application, applicant must show the existence of exceptional and unusual
G circumstances for the stay of proceedings to be granted.

[5] The test of exceptional and unusual circumstances was succinctly explained by the Federal Court in the case of *PP v. Dato' Sri Najib Hj Abdul Razak* [2019] 6 CLJ 561; [2019] 4 MLJ 421.

H **[6]** Briefly, in that case, the respondent was charged before the High Court with seven charges under the Malaysian Anti-Corruption Commission Act 2009, the Penal Code and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Three appeals were filed by the respondent when the High Court Judge dismissed the respondent's interlocutory applications which are as follows:

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(i) to secure a 'gag order' restraining publication of the respondent's trial; A

(ii) to obtain documents other than those provided under s. 51A of the Criminal Procedure Code;

(iii) to challenge the withdrawal by the Public Prosecutor of a transfer certificate to transfer the case to the High Court. B

[7] The respondent then applied for the respondent's proceedings at the High Court be stayed pending the disposal of the three appeals but was dismissed by the High Court Judge. On appeal, the Court of Appeal granted the stay of proceedings but was overturned by the Federal Court which held that the respondent has failed to establish exceptional or unusual C circumstances for stay of proceedings to be granted.

[8] The Federal Court has also laid down several important determinative principles in considering an application for stay of criminal proceedings. Richard Malanjum CJ (as he then was) in delivering the judgment of the court said this: D

> [32] In summary, in considering an application for stay of criminal proceedings when commencement of the trial is imminent or continuing in the court of first instance, the determinative principles to be derived from the above cases are as follows:
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> (a) *there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried* (*R v. Crawley and Others* [2014] EWCA Crim 1028 at para [18]); E
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> (b) *it is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The considerations of public interest are of great weight leaning in favour of expeditious resolution of accusations of crime;* F
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> (c) *the undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole. Any interference with any part of the process is antithetical to the proper and just disposition of criminal cases.* The caution about the undesirability of fragmentation of criminal process would be more pronounced G where a hearing of proceedings has actually commenced;
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> (d) *a stay of proceedings application will require especially compelling justification in a case qualifying for urgent judicial decision.* For instance, it is important that anyone charged with serious criminal offences be brought to trial expeditiously. *Public interest would not be served by allowing the defence to request for a delay. An accused of serious criminal offences who is not guilty should have the opportunity of clearing his name without excessive delay* (*Attorney General's Reference (No 2 of 2001)* [2003] H UKHL 68 at para [16]);
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> (e) *a stay of proceedings will not normally be granted pending an interlocutory appeal in a criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted.* This is so even if the issuing I of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence;

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(f) *the accused's rights over preliminary or interlocutory rulings made by the trial judge are best vindicated by appeal after conviction, if any.* It is generally more desirable to consider preliminary or interlocutory rulings made by the trial judge in appeal after conviction upon full trial with the benefit of a concrete factual setting than considering them in the abstract during interlocutory appeal;

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(g) *the fact that an accused will be put to the expense of a trial is irrelevant and would not qualify as 'exceptional circumstances' to justify a stay of a criminal trial pending resolution of an appeal*; and

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(h) *the courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings* such as an application for a declaration or other form of judicial review with similar relief in the nature of *certiorari*, be it commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial.

(emphasis added)

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[9] In the same case, it was held that the fact a proceeding may be rendered a nullity is not a special circumstance and it is also irrelevant that the accused is put to the expense of a trial and eventually acquitted. The Federal Court had this to say:

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[33] Now, the accused is a public figure who stands charged with offences which cannot by any means be described as trivial, allegedly committed while he was holding office as Prime Minister. Public interest, and indeed his personal interest, dictate that the trials against him should be commenced expeditiously without any unreasonable delay as it is at the denouement of the trial that the court is best-equipped to determine his guilt or otherwise based on factual evidence instead of speculative arguments. Furthermore, he has not established to our satisfaction that his application is so unusual or exceptional that it falls within that class of cases which would justify the grant of a stay. *As stated above, a stay of criminal proceedings will only be granted in the rarest of cases and the fact that the proceedings may be rendered a nullity is not a special circumstance. In the context of an application for a stay of proceedings, it is also immaterial that the accused is put to the expense of a trial even if he is subsequently vindicated on appeal.*

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(emphasis added)

[10] We noted that there is no exhaustive definition of special or exceptional circumstances but guidance can be made to the statement by Raja Azlan Shah (as His Majesty then was) in *Leong Poh Shee v. Ng Kat Chong* [1965] 1 LNS 90; [1966] 1 MLJ 86:

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Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. **It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.** (emphasis added)

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[11] Reverting to the present application, the main contention by counsel for the applicant was that the proceedings at the High Court may be rendered a nullity if their appeal to the Court of Appeal is successful. This is due to the fact that the legality of the proceedings and the legality of the appointment of DGSR as the lead prosecutor were the subject matter of the applicant's appeal. In relation to this, as decided by the Federal Court in *Dato Sri Najib*'s case alluded to earlier, the proceedings may be rendered a nullity is not a special circumstance and as such it does not support the applicant's application for the stay of proceedings.

[12] We have also considered public interest which dictates that the trial of serious offence especially by a public figure to be resolved expeditiously without interruption or fragmentation by interlocutory appeal. Moreover, the hearing of the applicant's proceedings has already commenced which need to be completed without delay. Besides, it is also the best interest of the applicant if the trial be resolved as soon as possible where the applicant has the opportunity to put her defence and clear her name if she is innocent.

[13] In addition, we find expeditious completion of a criminal trial is in tandem with the intention of the Parliament when s. 172B of the Criminal Procedure Code (CPC) was enacted and came into effect on 1 June 2012. Section 172B(4) requires a trial to commence no later than three months after an accused was charged. Clearly, a long delay including granting stay of proceedings without exceptional or unusual circumstances will defeat the Parliament's intention.

[14] In proposing the Bill for the insertion of s. 172, including s. 172B(4) of the CPC, the Deputy Minister in the Prime Minister Department in his statement which can be seen in Hansard dated 22 April 2010, said this:

> Datuk Liew Vui Keong: Tuan yang Di-Pertua, sehingga hari ini peningkatan kes jenayah di mahkamah di negara ini adalah begitu mendadak. Berikutan itu terdapat banyak kes yang tertunggak di Mahkamah Jenayah dan ini boleh menjejaskan pentadbiran keadilan di Malaysia. Di bawah Common Law adalah menjadi prinsip asas bahawa keadilan yang dilengah-lengahkan adalah keadilan yang dinafikan dengan izin, justice delayed is justice denied. Perbicaraan yang terlalu lama bagi sesuatu kes jenayah akan menjejaskan hak individu yang dituduh dan seterusnya menjejaskan keterangan yang menjadi dasar bagi membuktikan sesuatu penghakiman. Kerajaan memandang serius perkara ini.
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> Tuan Yang di-Pertua, kerajaan telah mengkaji sebab-sebab yang boleh melambatkan perbicaraan kes jenayah dan mencari jalan supaya proses pendakwaan dan perbicaraan kes-kes tersebut boleh disegerakan. Sehubungan dengan itu kerajaan telah mencadangkan supaya system speedy trial dilaksanakan di Malaysia.
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A *Sistem speedy trial ini bertujuan untuk memastikan kes-kes jenayah di mahkamah dapat diselesaikan dengan secepat mungkin dan untuk memastikan kes-kes jenayah tidak tertunggak untuk tempoh yang terlalu lama, sehingga menyebabkan pihak-pihak yang terlibat dalam proses pentadbiran keadilan jenayah dicabar sama ada di peringkat domestik ataupun antarabangsa.* Tuan Yang di-Pertua, kerajaan telah mengkaji sama ada suatu perundangan yang khusus perlu diubah
B atau memadai untuk meminda perundangan yang sedia ada untuk memperuntukkan mengenai konsep speedy trial dan perkara-perkara yang berkaitan dengannya.

Setelah mengambilkira pelbagai aspek dan hasil kajian yang telah dijalankan, kerajaan telah memutuskan untuk meminda perundangan
C yang sedia ada iaitu meminda Kanun Tatacara Jenayah (Akta 593) untuk memperuntukkan mengenai *speedy trial yang akan memendekkan tempoh perbicaraan dan mempercepatkan proses pelupusan perbicaraan jenayah …*

(emphasis added)

[15] Further, we are also of the view that the applicant's rights over the
D High Court Judge rulings are best vindicated by an appeal after a full trial and if convicted, with the benefit of all relevant facts which were placed before the trial judge. We do not see any miscarriage of justice in the circumstances.

[16] On the issue that the applicant's appeal would be rendered nugatory,
E we find this contention is bereft of any merit. As mentioned earlier, a proceeding may be rendered a nullity and the applicant will be put to the expense of a trial are not special circumstances for the granting of stay proceedings. Therefore, the issue of nugatory of the applicant's appeal does not arise. In any event, the applicant would not be deprived the result of her
F appeal if successful.

[17] Having weighed all the grounds advanced by the applicant in the present application, we find, there is no compelling justification for this court to grant the stay of proceedings. The applicant has not shown any exceptional or unusual circumstances to justify the stay application.

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[18] In the circumstances, it is our unanimous decision that the applicant's application for the stay of proceedings is dismissed.

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